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No. 88-606

In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF BAYTOWN, TEXAS, ET AL., PETITIONERS

v.

TONY CAMPOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, may be construed to protect a combined minority group consisting of Hispanic and black voters against vote dilution.

2. Whether the lower courts correctly concluded that results in elections involving only white candidates did not rebut the conclusion that there was a clear pattern of polarized voting, where petitioners failed to establish that minority voters sponsored any white candidates in those elections and there was a pattern of polarized voting in contests involving minority and white candidates.

3. Whether the evidence supports the lower courts' findings that respondents established each of the three critical elements of a Section 2 vote dilution claim as set out in *Thornburg* v. *Gingles,* 478 U.S. 30 (1986).

TABLE OF CONTENTS

	Page
Statement	1
Discussion	2
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

Cases:

East Jefferson Coalition v. *Jefferson Parrish*, 691 F. Supp. 991 (E.D. Oa. 1988) 12

Keyes v. *School District No. 1*, 413 U.S. 189 (1973) 9

LULAC v. *Midland Independent School District*: 812 F.2d 1494 (5th Cir. 1987), aff'd, 829 F.2d 546 (5th Cir. 1987) 11

Rogers v. *Lodge*, 458 U.S. 613 (1982) 13

Smith v. *Clinton*, 687 F. Supp. 1310 (E.D. Ark.), aff'd, 109 S. Ct. 548 (1988) 12

Thornburg v. *Gingles*, 478 U.S. 30 (1986) 2, 11, 12, 13, 14

Town of Hunting v. *NAACP*, No. 87-1961 109 S. Ct. 279 (1988) 8, 9

Statutes:

Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:

§ 2, 42 U.S.C. 1973 ..... 2, 4, 5, 7, 8, 9, 12, 14

§ 2(a), 42 U.S.C. 1973(a) 2, 9

§ 2(b), 42 U.S.C. 1973(b) 2, 12

§ 4(f)(2), 42 U.S.C. 1973b(f)(2) 2, 9

§ 5, 42 U.S.C. 1973c 11

Miscellaneous:

S. Rep. No. 417, 97th Cong., 2d Sess. (1982) 9, 10

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Baytown, Texas, population 56,917, is about 16% Hispanic and nine percent black. Its City Council consists of six council members and a mayor, all seven of whom are elected in City-wide elections. While all elections are held at-large, each position on the City Council is tied to a particular district and candidates run for election only against other candidates who have declared for that particular position. Candidates must obtain a majority vote from the City-wide electorate to win, so runoff elections are held whenever no candidate for a position obtains more than 50 percent of the vote. No Hispanic or black

candidate has ever been elected to Baytown's City Council. Pet. App. 2e, 15e-16e nn. 1, 2.

In 1986, respondents, who are Hispanic and black voters in Baytown, filed suit in federal district court alleging that the at-large system for electing members to the Baytown City Council dilutes minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (Pet. App. 1a). Section 2(b) provides that the Act is violated where members of protected classes, which include both blacks and Hispanics (42 U.S.C. 1973(a), 1973b(f)(2)), "have less opportunity than other members of the electorate * * * to elect representatives of their choice."

2. Following a trial, the district court evaluated the plaintiffs' claim using the framework established in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), to evaluate vote dilution claims. "Stated succinctly," this Court stated, to prevail in a challenge to an at-large voting system plaintiffs need to show that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 48-49. The Court elaborated: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * *—usually to defeat the minority's preferred candidate." *Id.* at 50-51.

The district court here first found that Hispanics and blacks, when combined into one group, are sufficiently large and compact to constitute a majority in a single-member district. Pet. App. 11a. The court noted that

Hispanics and blacks are "relatively compact and insular" and that they "primarily reside in the southern portion of Baytown" in contiguous census tracts. *Id.* at 2a. The court also noted that the plaintiffs had shown that it would be possible to create a district in which Hispanics and blacks together constitute more than 70 percent of the population. *Id.* at 11a.

The district court next found that Hispanics and blacks in Baytown are politically cohesive. Pet. App. 11a-12a. The court relied in part on a regression analysis that showed that in each of five elections Hispanics and blacks as a group overwhelmingly preferred the minority candidate. *Id.* at 5a-6a. The court also credited testimony of political leaders that Hispanics and blacks "work[] together on political campaigns" and have "similar concerns over political issues." *Id.* at 3a.

Third, the court concluded that whites have refused to vote for minority candidates in sufficient numbers to permit the election of a minority candidate. Pet. App. 12a. The court noted that in all eight elections in which a minority candidate ran for City Council, "the minority candidate has lost." *Ibid.* The court further found that in six recent elections (including four City Council elections and two school board elections), a majority of whites never favored the minority candidate. In fact, no minority candidate for City Council ever obtained more than 37 percent of the white vote. *Id.* at 3a-6a.

Turning to other relevant factors, the court found that "minorities in Baytown carry with them the results of past discrimination to a substantial extent." Pet. App. 15a. In particular, the court found that "[i]n areas of education, household income, percent below poverty line, occupational status and unemployment, Blacks and Hispanics were markedly different from their white counterparts."

Id. at 7a. While the court found that Baytown's elected officials had been responsive to minority needs, it concluded that "this single factor alone is not sufficient to mitigate the seriousness of the many results of past discrimination that the minority citizens of Baytown must bear—in particular their inability to participate fully in the electoral system in Baytown." *Id.* at 16a.

The court next rejected petitioners' claim that elections involving only white candidates show that Hispanics and blacks are able to elect candidates of their choice. Pet. App. 13a-14a. The court found, based on the testimony at trial, that "the preferred candidate of minority voters [in Baytown] is a minority candidate." *Id.* at 6a. The court also found that "minority voter turnout increased dramatically in the years when a minority candidate was running for council," demonstrating that "minorities have significantly more interest in White versus Minority races than White versus White races." *Id.* at 6a-7a. For those reasons, the court concluded that "the White versus White races that [petitioners] requested this court to examine are not probative of minority preference." *Ibid.*

Based on these findings, the court concluded that Baytown's at-large system results in a dilution of minority voting strength in violation of Section 2. Pet. App. 16a. As a remedy, the court directed petitioners to present a plan that included at least one single-member district with a combined Hispanic and black population greater than 50 percent. Pet. App. 1b. In response, petitioners submitted a "5-3-1" plan, which included five members elected from districts, three members elected at-large, and a mayor elected at-large. *Id.* at 1d. One of the districts has a 66 percent minority population. *Id.* at 5e. Although the plaintiffs objected to the inclusion of the at-large seats, the district court approved petitioners' plan. *Id.* at 2d-3d.

3. The court of appeals affirmed the district court's finding of a Section 2 violation. Pet. App. 1e-20e. It noted that the district court had properly concluded that Section 2 permits plaintiffs to "identify[] the protected aggrieved minority to include both Blacks and Hispanics." Pet. App. 5e. To prove such a claim, the court held, plaintiffs must show "that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority." *Ibid.*

The court concluded that respondents had satisfied that standard. In particular, the court affirmed the district court's finding that Hispanics and blacks have voted as a cohesive bloc and that whites have voted sufficiently as a bloc to defeat candidates preferred by minority voters. The court noted that "[i]f the evidence were to show that the Blacks vote against a Hispanic candidate, or vice versa, then the minority group could not be said to be cohesive." Pet. App. 8e. But, the court found, that is not what the evidence showed here. To the contrary, the evidence showed that in each of three City Council elections minority voters had strongly favored a minority candidate who was not elected because the candidate found little support among whites: "In the 1986 race for City Council Position 1, Mario Delgado [a Hispanic] received approximately 83% of the minority votes but only 37% of the Anglo vote and lost the election. In the 1984 race for Position 1, Tony Campos [a Hispanic] received 63% of the minority vote but only 29% of the white vote and lost the election. In the 1979 race for Position 3, Ruby Hardy [a black] received approximately 78% of the minority vote but only three percent of the white vote and lost the election." *Id.* at 12e-13e; see also *id.* at 19e n.9.

The court further rejected "the heart of Baytown's complaint" on appeal (Pet. App. 9e), which was its contention that evidence concerning Precinct 248 showed that blacks did not support Hispanic candidates so that the minority groups could not be said to be cohesive. The evidence concerning Precinct 248, which is predominatly black, showed that the white candidate, Simmons, defeated the Hispanic candidates, Campos and Delgado, by large margins there in the 1984 and 1986 elections, respectively. However, the court of appeals concluded that the district court had not erred in finding that Precinct 248, a very small precinct, was not indicative of black voting activity. First, the court of appeals noted, there was evidence that Precinct 248 was "controlled" by a black high school principal who "felt that support of Simmons was important to retaining his job." *Id.* at 10e. Second, analysis of other precincts containing more black voters than Precinct 248 showed that Precinct 248 was not at all typical of how blacks had voted in those elections. For example, Precinct 102, which contained the most black voters, was carried handily by the two Hispanic candidates in the 1984 and 1986 elections. *Id.* at 11e.

The court of appeals also concluded that "[t]he district court was warranted in its focus on those races that had a minority member as a candidate." Pet. App. 7e. It noted that this Court in *Gingles* "looked only to elections where Black candidates were running." *Ibid.* That approach was reasonable here, the court of appeals stated, since "[t]here was no evidence that any Anglo-Anglo race for Baytown City Council offered the voters the choice of a 'viable minority candidate' " and "minority voter turnout increased dramatically when there was a candidate who was a member of the minority group." *Id.* at 7e-8e.

On the question or remedy, the court of appeals noted that while petitioners were required to submit their plan to

the Department of Justice for preclearance, they had not done so. Pet. App. 15e. The court therefore vacated the plan and "remand[ed] to the district court in order that Baytown may submit the plan for preclearance." *Ibid.*[1]

4. A petition for rehearing en banc was denied with six judges dissenting. Pet. App. 1f-6f. The dissenting judges would have considered en banc whether Section 2 extends its protections to a minority group composed of two distinct minorities. In their view, the panel had "confuse[d] a cohesive voting minority with protected minorities who sometimes share similar political agendas." Pet. App. 4f.

DISCUSSION

1. Petitioners first contend (Pet. 7-12) that this Court should grant review to decide whether Section 2 may be construed under any circumstances to protect a combined minority group consisting of Hispanic and black voters against vote dilution. While we believe that this is an important question, and that it is not easily resolved since the statute itself does not provide an answer, we think that review by this Court is not warranted in this case.

First, petitioners conceded in the court of appeals that Hispanics and blacks may be treated as a single minority group in some cases. They stated: "The City of Baytown does not propose that Blacks and Hispanics cannot con-

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[1] Petitioners subsequently submitted their 5-3-1 plan to the Department of Justice for preclearance. On March 20, 1989, the Department objected to the plan. App., *infra*, 1a-4a. Thereafter, petitioners sought preclearance of a "5-1-1" plan, which included five single-member districts and two at-large districts (one for a council member and one for the mayor), for use in a special election to be held on May 20, 1989. The Department of Justice precleared that plan for use on this one occasion. App., *infra*, 5a-6a.

stitute a single class of minorities for purposes of establishing a violation of the Voting Rights Act, * * * but rather that in the instant case, Black and Hispanic voters in Baytown, treated as a single class of minority, do not satisfy the three element threshold test established by the Supreme Court in *Thornburg* [v. *Gingles*]." Baytown C.A. Br. 17. Thus, petitioners failed to preserve for review the broad issue that they have asked the Court to address—whether Section 2 may be construed under any circumstances to protect a combined minority group. *Town of Huntington* v. *NAACP*, 109 S. Ct. 276, 277 (1988).[2]

Second, the Fifth Circuit's resolution of the issue[3] does not conflict with the decision of any other court of appeals or this Court. Indeed, the Fifth Circuit is the first court of appeals to address the issue. Thus, the question is one of first impression, and this Court would not have the benefit of the views of any other courts of appeals if it decided to resolve the issue now.

Finally, petitioners' concession in the court of appeals—that at least in some cases blacks and Hispanics may be treated as one minority group protected by Section 2—is, in our view, correct. Section 2 does not address the question whether the groups it protects can be considered

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[2] Petitioners argue that the lower courts misapplied *Gingles* (Pet. 16-18) separately from their argument that blacks and Hispanics may never be treated as a combined minority group (Pet. 7-12). We respond to their narrower factual argument *infra*, pages 14-16.

[3] Given that there was no dispute among the parties in the court below as to whether blacks and Hispanics may ever be treated as one group, the court of appeals merely noted that "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics" (Pet. App. 5e), and then turned to the issue on which the parties disagreed, which was whether *Gingles* had been applied properly.

together. However, it protects both Hispanic and black voters against election systems that dilute their voting strength. 42 U.S.C. 1973(a), 1973b(f)(2). As this Court explained in *Gingles,* the determination as to whether an election system dilutes minority voting strength " 'depends upon a searching practical evaluation of the past and present reality,' * * * and on a 'functional' view of the political process." 478 U.S. at 45 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 30 & n.120 (1982)). This is necessarily a "flexible, fact-intensive inquiry." 478 U.S. at 46. Accordingly, if the political reality is that Hispanics and blacks view themselves to a significant degree as a single unit, and are viewed by whites as disfavored "minorities," then it is sensible to treat them as one group under the Voting Rights Act. Thus, in our view, where Hispanics and blacks vote as a single cohesive bloc, and whites vote as a bloc to defeat their preferred candidates, Section 2 permits Hispanics and blacks to assert a vote dilution claim as a single combined minority.[4]

To be sure, as the judges who dissented from the denial of rehearing en banc stated, the Voting Rights Act protects minority groups that are defined by racial and language criteria. It does not protect political coalitions of any sort. Pet. App. 3f. But where the coalition consists of groups specifically protected by the statute, and the plaintiffs can

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[4] This Court has recognized in a similar situation that the group protected against discrimination should be defined in terms of the actual nature of the discrimination, rather than in some more formalistic way. In *Keyes* v. *School District No 1,* 413 U.S. 189, 198 (1973), the Court held that Hispanics and blacks should be treated as a single minority group protected against school segregation when they "suffer identical discrimination in treatment when compared with the treatment afforded Anglo students." It accordingly held that "the District Court erred in separating Negroes and Hispanos for purposes of defining a segregated school." *Id.* at 197. In addition, in enforcing

satisfy the *Gingles* standards—including demonstrating the same degree of cohesion within the coalition that would otherwise be required within a single minority group—then, we think, Congress's goals are advanced if they are treated as one group.

Indeed, acceptance of petitioners' contrary interpretation of Section 2 would mean that Hispanics and blacks could prove every factor listed in the 1982 Senate Report as relevant to a Section 2 claim (see S. Rep. No. 417, *supra,* at 28-29) and still not prevail. In other words under petitioners' theory even if Hispanic and black voters could prove that they have suffered a common history of discrimination in voting, that they have voted as a cohesive bloc, that whites have refused to support their preferred candidates, that whites have excluded them from the slating process, that they bear the effects of discrimination in education and employment, that the election system contains factors that enhance dilution, that campaigns are characterized by racial appeals, that no minority candidate has ever been elected, and that they could jointly elect candidates of their choice in a single-member district, relief would still be inappropriate, according to petitioners, if neither group alone was sufficiently large to constitute a voting age majority in any one district. That result cannot be reconciled with Congress's insistence on a pragmatic inquiry into whether election systems deny minority voters an equal opportunity to elect candidates of their choice.[5]

Section 5 of the Voting Rights Act, the United States has analyzed the impact of voting changes on Hispanics and blacks as a combined group when the evidence shows that they are politically cohesive.

[5] Moreover, racial and ethnic minority groups are not homogeneous. Petitioners' logic might therefore lead them to object to considering the combined populations of African and West Indian

2. Petitioners next contend (Pet. 12-16) that the lower courts erred in finding a pattern of racially polarized voting in Baytown in the face of evidence they presented purporting to show that minority voters prefer white candidates. That fact-bound contention does not warrant review. In any event, it is without merit, particularly when judged under the applicable clearly erroneous standard. *Gingles*, 478 U.S. at 79.

The evidence showed that in all eight elections in which minority candidates ran for City Council, they lost. Pet. App. 2a. It also showed that in five recent elections (including two school board elections), Hispanics and blacks as a group overwhelmingly preferred the minority candidate. *Id.* at 19e n.9. In contrast, not many whites voted for the minority candidates, and those candidates were not elected to the City Council because they obtained little support from white voters. *Ibid.* Based on that evidence, the lower courts properly concluded that racial bloc voting by whites repeatedly prevented minority voters from electing candidates of their choice.[6]

The lower courts were justified in discounting evidence beyond those elections. Experience has shown that in communities that are racially polarized the minority group's candidate of choice will often be a minority group member. *Gingles*, 478 U.S. at 68 (plurality opinion). In

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blacks, for instance, or Puerto Rican and Mexican Hispanics. Cf. *LULAC* v. *Midland Independent School District*, 812 F.2d 1494, 1500, aff'd en banc on other grounds, 829 F.2d 546 (5th Cir. 1987). Conversely, petitioners' theory would not account for the proper racial classification of individuals with combined black and Hispanic ancestry.

[6] Petitioners raise no challenge to the sufficiency of the evidence of vote dilution by offering nonracial "explanations of the reasons why white voters rejected minority candidates." *Gingles*, 478 U.S. at 100 (opinion of O'Connor, J.); see also *id.* at 83 (opinion of White, J.).

such communities, minority support for one white candidate over another is likely to reflect the absence of a minority candidate, rather then the presence of a white candidate so closely identified with minority interests that he is equally preferred by minority voters. Moreover, "Section 2 was not designed, nor [should] it be construed, to provide minority groups the ability to participate equally in the electoral process and to have the opportunity to elect representatives *only* if those candidates are white." *East Jefferson Coalition* v. *Jefferson Parish,* 691 F. Supp. 991, 1001 (E.D. La. 1988). For these reasons, when, as here, there is a clear pattern of polarized voting in elections between minority and white candidates, evidence from elections involving only white candidates can be correctly concluded to be uninformative. *Smith* v. *Clinton,* 687 F. Supp. 1310, 1317 (E.D. Ark.), aff'd, 109 S. Ct. 548 (1988).

The language of Section 2 and this Court's decision in *Gingles* reinforce this conclusion. Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in a vote dilution case. Obviously, no member of a minority group can be elected in a contest between white candidates only. In *Gingles,* this Court recognized that the extent to which minority candidates had been successful is an important factor to consider in a Section 2 case. 478 U.S. at 48-49 n.15. In that case, it affirmed a finding of a Section 2 violation that was based entirely on analyses of the results of elections between minority and white candidates. 478 U.S. at 52-54. The lower courts committed no legal error in following that same approach here. They committed no factual error either, particularly since the district court, based upon testimony at trial, concluded that minorities in Baytown would like to elect a minority

group member to the City Council, a finding that is supported by the evidence showing that minority voter turnout has increased dramatically when a minority candidate has run for office. Pet. App. 6a-7a, 7e-8e.

Moreover, petitioners failed to establish that minority voters genuinely preferred any candidates in the elections involving only white candidates. Petitioners' contention that minorities in Baytown prefer white candidates was based on their analysis of voting patterns in two precincts. Baytown C.A. Br. 31-32. As both the district court (Pet. App. 8a) and the court of appeals (*id.* at 10e-11e) found, however, Precinct 248, a small, predominantly black precinct, is not representative of how blacks in other Baytown precincts vote. There is no good reason to reconsider that concurrent finding. *Rogers* v. *Lodge,* 458 U.S. 613, 622-627 (1982) (concurrent findings of two lower courts normally left undisturbed). Similarly, there is no basis for petitioners' contention, drawn from voting records in Precinct 102, that Hispanics prefer white candidates. Precinct 102 is only 61 percent Hispanic. Pet. App. 20e n.12. Petitioners' contention that the votes cast by all voters in Precinct 102 show how Hispanics across the City voted is highly speculative.

Petitioners also contend (Pet. 15) that the clear implication of the court of appeals' opinion is that evidence from elections involving only white candidates can never be analyzed in a vote dilution case. We agree with petitioners that such a view would go too far. As the plurality stated in *Gingles,* "[u]nder § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important." 478 U.S. at 68. But we do not believe that the court of appeals embraced the view ascribed to it by petitioners. See Pet. App. 6e-8e, 13e. Rather, it concluded that given the polarized voting in contests between white and minority candidates

and the absence of persuasive evidence that minority voters genuinely preferred any white candidates, the elections involving only white candidates cited by petitioners did not demonstrate the absence of racially polarized voting in Baytown.

3. Finally, petitioners contend (Pet. 16-18) that the lower courts erred in finding that respondents established the three critical elements of vote dilution set out by the Court in *Gingles*. These concurrent fact-bound determinations do not warrant this Court's review. *Rogers* v. *Lodge*. In any event, petitioners have again failed to show that the district court clearly erred. *Gingles*, 478 U.S. at 79.[7]

Petitioners argue first (Pet. 16-17) that the lower courts erred in finding that Hispanic and black voters could constitute an effective voting majority in a single-member district in Baytown. But exhibits submitted by respondents showed that it would be possible to draw a district that is over 70 percent minority in population, well above the threshold petitioners assert is necessary for effective control. Pet. App. 5e. In addition, petitioners' own remedial plan contains a district with a 66 percent minority population (*ibid.*), and petitioners conceded in the court of appeals that Hispanics could effectively control that district (Baytown C.A. Br. 19). Thus, the lower courts correctly concluded that a single-member district controlled by minorities could be constructed in Baytown.[8]

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[7] The lower courts also noted, of course, that there were other indicia of a Section 2 violation in addition to racial bloc voting. See Pet. App. 2a, 7a, 15a, 14e.

[8] We agree with petitioners (Reply Br. 9) that it does not appear that voting age Hispanics could constitute a majority in any one district. Minorities constitute a controlling majority under the plan respondents have proposed only because blacks and Hispanics are treated as one group.

Petitioners next contend (Pet. 17-18) that the lower courts erred in finding that Hispanics and blacks in Baytown are cohesive. But respondents introduced bivariate regressions—statistical analyses of the same sort that this Court found persuasive in *Gingles*—that showed that Hispanics and blacks, considered together, had overwhelmingly supported minority candidates. Pet. App. 5a-6a, 19e.[9] Respondents also presented the testimony of political leaders that Hispanics and blacks work together in political campaigns. *Id.* at 3a. As petitioners point out (Pet. 17-18), Precinct 248, which is overwhelmingly black, has voted against Hispanic candidates. But the lower courts cited evidence that Precinct 248 contains a small number of voters, that it is effectively controlled by a single individual, and that blacks in the precinct with the largest absolute number of blacks—Precinct 102—have preferred Hispanic candidates. Pet. App. 9e-11e. The lower courts therefore correctly concluded that Precinct 248 is not representative of how blacks vote in the rest of Baytown. Thus, while the evidence does not indisputably

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[9] Respondents also presented statistical analyses showing that Hispanics overwhelmingly preferred Hispanic candidates and blacks overwhelmingly preferred black candidates. It would have been preferable if respondents had produced a more complete set of regressions showing the level of black support for Hispanic candidates and the level of Hispanic support for black candidates, as petitioners suggest (Reply Br. 8). Such data is desirable in order to ensure that a very cohesive minority group is not enlarged into a group capable of controlling a single-member district by the addition of other minority voters who are not truly cohesive with the base group. Because it is not always possible to perform such regressions, however, and because other evidence may be sufficient to prove that blacks can be expected to vote for Hispanic candidates and vice versa, the failure to perform such regressions need not be fatal to a claim that two groups are cohesive.

establish that blacks and Hispanics in Baytown are a cohesive group, petitioners have not demonstrated that the lower courts' finding to this effect is clearly erroneous.

Petitioners finally contend (Pet. 18) that the lower courts erred by finding that whites have voted as a bloc to defeat minority candidates. The evidence shows, however, that no minority group member has ever been elected to the Baytown City Council. Pet. App. 2a. It also shows that whites have voted as a bloc to defeat three City Council candidates who received overwhelming support from minority voters. *Id.* at 19e n.9. In those circumstances, the lower courts' conclusion that the plaintiffs are entitled to relief under Section 2 cannot be said to be clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Office of the Assistant Attorney General
Washington D.C. 20530
March 20, 1989

Randall Strong, Esq.
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P.O. Box 424
Baytown, Texas 77522

Dear Mr. Strong:

This refers to the change in the method of electing the city council from voting at large (with residency districts) to election of five members from single-member districts and four (including the mayor) at large, the districting plan, the increase in the number of councilmembers from seven to nine, the provision that the three at-large members other than the mayor will be elected from numbered positions to staggered terms, the implementation schedule, the elimination of eleven polling places, and the realignment of voting precincts for the City of Baytown in Chambers and Harris Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the information to complete your submission on March 3, 1989.

We have considered carefully the information you have provided, comments and information received from other interested parties, and the opinions of the district court and the court of appeals in *Campos* v. *City of Baytown,*

Texas, C.A. No. H-85-1021 (S.D. Tex. Jan. 5 and March 25, 1987), *vacated and remanded,* 840 F.2d 1240, *reh'g denied,* 849 F.2d 943 (5th Cir. 1988).

The district court ruled, and the court of appeals affirmed, that the city's at-large method of election violates Section 2 of the Voting Rights Act. In response to these rulings, the city now proposes the mixed method of election outlined above for an expanded nine-member city council. Our analysis of the opportunity that this plan provides minority citizens to participate in the political process and elect candidates of their choice is guided by the district court's findings of fact (also affirmed by the appellate court), including the determination that black and Hispanic city residents are politically cohesive and that white persons vote sufficiently as a bloc to defeat the minorities' preferred candidates.

It appears that the proposed plan will permit minority citizens, who constitute one-fourth of the city's population, the opportunity to elect only one of nine city councilmembers, the representative from the majority-minority single-member district. This result flows primarily from the manner in which at-large positions were included in the proposed plan: they offer minority voters no more realistic opportunity to elect a candidate of their choice than do the at-large positions in the existing system.

Although the city was required to develop a new method of electing city councilmembers to remedy the violation that adheres to the existing at-large election system, the system proposed by the city would continue to elect nearly half of the city council by the at-large method which has been found by the courts to discriminate against minority persons. We particularly note that the city chose to impose anti-single-shot provisions on the proposed at-large seats, thus eliminating the electoral opportunity minorities

otherwise would have to elect a person of their choice to these seats through the technique of single-shot voting. In addition, we note that a majority vote requirement was retained for these seats though opposed by minority residents.

During the process leading to the adoption and submission of this plan for Section 5 review, the city developed several alternative plans and minority representatives also put forth several alternatives, including alternatives for single-member district plans and combinations of single-member districts with one or more at-large seats. It appears that from among these alternatives the city chose the election plan that offers minority voters the least opportunity to participate in city council elections and elect candidates of their choice.

Moreover, we have not been provided any nonracial reasons for the city's inflexible adherence to the proposed plan. We understand that the city may wish to retain some at-large representation on the city council, but this does not explain the restrictions that have been placed on voting for the at-large seats in the proposed plan. For example, the numbered positions are not now used, and a system of staggered terms for all councilmembers could be retained while providing that the terms of the councilmembers occupying the at-large seats run concurrently.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the burden has been sustained in this instance. Therefore, on behalf of the

Attorney General, I must object to the proposed method of election and the districting plan. Because the precinct and polling piace changes are directly related to the election method change, we will make no determination on these matters at this time.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes will have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia court is obtained, the effect of the objection by the Attorney General is to make the proposed method of election legally unenforceable.

Since this matter is pending before the United States District Court for the Southern District of Texas in *Campos* v. *City of Baytown, Texas,* we are providing a copy of this letter to the Court.

To enable this Department to meet its responsibility to enforce the Voting Right Act, please inform us of the course of action the City of Baytown plans to take with respect to this matter. If you have any questions, feel free to call Mark A. Posner (202-724-8388), an attorney in the Voting Section.

Sincerely,

JAMES P. TURNER

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

[May 2, 1989]

JPT:MAP:KMN:gmh
DJ 166-012-3
Y4380-4382
Y4694-4696

Randall B. Strong, Esq.
City Attorney
P.O. Box 424
Baytown, Texas 77522

Dear Mr. Strong:

This refers to the interim change in the method of electing the city council from at large to five single-member districts and two at large (including the mayor) to be implemented at the May 20, 1989, election only; the districting plan which also is to be implemented only at the May 20, 1989, election; the implementation schedule; the procedures for conducting the May 20, 1989, special election and June 3, 1989, runoff; and the candidate qualifying period for the City of Baytown in Harris and Chambers Counties, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on April 6, 1989; supplemental information was received on May 1, 1989. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act

expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.41 and 51.43.

We note that the implementation of the submitted method of election and districting plan in any future elections would require Section 5 preclearance.

Sincerely,

JAMES P. TURNER
Acting Assistant Attorney General
Civil Rights Division

By: Barry H. Weinberg
BARRY H. WEINBERG
Acting Chief, Voting Section

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